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No. 86-1143

In The

# Supreme Court of the United States

October Term, 1986

NABOR ORTEGA, AURELIO GONZALEZ,
and all others similarly situated,

*Petitioners,*

v.

BILL M. ROWE, *et al.*,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF IN OPPOSITION

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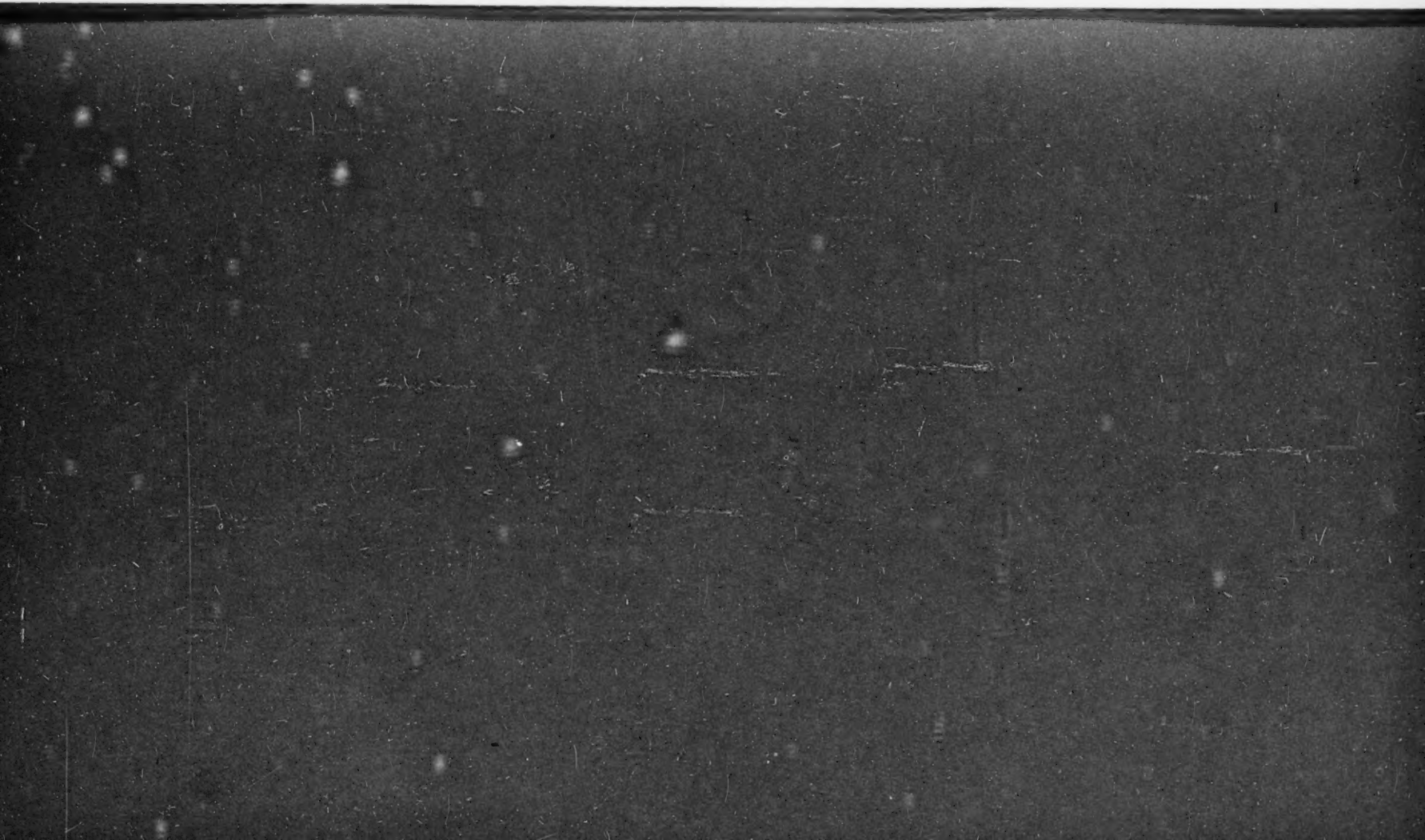

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the U.S. Court of Appeals for the Fifth Circuit correctly applied the holdings of *Daniels v. Williams,* 474 U.S. —, 106 S.Ct. 662 (1986) and *Davidson v. Cannon,* 474 U.S. —, 106 S.Ct. 668 (1986) to the circumstances of this case?

2. Whether *Daniels v. Williams* and *Davidson v. Cannon* overrule *Bell v. Wolfish,* 441 U.S. 520, 99 S.Ct. 1861 (1979)?

3. Whether the courts below erred in holding that the conditions of confinement in Lubbock City Jail did ***not*** amount to punishment in violation of the Fifth Amendment or to a deprivation of Petitioners' constitutional or legal right to due process?

4. Whether Petitioners have standing in federal court to litigate a 42 U.S.C. § 1983 claim alleging due process deprivations under the Fourteenth Amendment against Respondent City of Lubbock, considering the restrictions of *Parratt v. Taylor,* 451 U.S. 527, 101 S.Ct. 1908 (1981), and notwithstanding the modification of *Parratt v. Taylor* by the holding in *Daniels v. Williams?*

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iii

STATEMENT OF THE CASE ..... 1

SUMMARY OF ARGUMENT ..... 6

ARGUMENT

ARGUMENTS UNDER QUESTION ONE:

I. Petitioners' argument regarding government policies does not apply ..... 9

II. The Fifth Circuit's definition of negligence in this case was not contrary to the definition in *Davidson v. Cannon* ..... 14

ARGUMENTS UNDER QUESTION TWO:

I. The opinions below do not conflict with *Bell v. Wolfish* ..... 17

ARGUMENTS UNDER QUESTION THREE:

I. Case law and evidence supports the holding of the courts below ..... 20

ARGUMENTS UNDER QUESTION FOUR:

I. Petitioners have no standing to sue under 42 U.S.C. § 1983 ..... 26

CONCLUSION ..... 27

## TABLE OF AUTHORITIES

Page

CASES

*Adams v. Carlson*, 488 F.2d 619 (7th Cir. 1973) ..... 25

*Adams v. Pate*, 445 F.2d 105 (7th Cir. 1971) ..... 22, 24

*Anela v. City of Wildwood*, 790 F.2d 1063 (3rd Cir. 1986) ..... 19

*Baker v. McCollan*, 443 U.S. 137, 99 S.Ct. 2689 (1979) 22

*Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861 (1979) ..... 1, *passim*

*City of Oklahoma City v. Tuttle*, — U.S. —, 105 S.Ct. 2427 (1985) ..... 10, 14

*Crowe v. Leeke*, 540 F.2d 740 (4th Cir. 1976) ..... 22

*Crusoe v. DeRobertis*, 714 F.2d 752 (7th Cir. 1983) ..... 25

*Daniels v. Williams*, 474 U.S. —, 106 S.Ct. 662 (1986) ..... 6, *passim*

*Davidson v. Cannon*, 474 U.S. —, 106 S.Ct. 668 (1986) ..... 6, *passim*

*Griffin v. Smith*, 493 F.Supp. 129 (W.D.N.Y. 1980) ..... 23

*Hoitt v. Vitek*, 497 F.2d 598 (1st Cir. 1974) ..... 22

*Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401 (1977) ..... 21

*Jones v. Diamond*, 636 F.2d 1364 (5th Cir. 1981) ..... 21, 22

*Lareau v. Manson*, 651 F.2d 96 (2nd Cir. 1981) ..... 20, 22

*Martinez v. California*, 444 U.S. 277, 100 S.Ct. 553 (1980) ..... 22

*Medina v. O'Neill*, 589 F.Supp. 1028 (S.D. Tex. 1984) ..... 21

*Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018 (1978) ..... 12, 13

TABLE OF AUTHORITIES—Continued)

Page

*Novak v. Beto,* 453 F.2d 661 (5th Cir. 1971) ..... 22, 23

*Owen v. City of Independence,* 445 U.S. 622, 100 S.Ct. 1398 (1980) ..... 10, 13, 14, 22

*Parratt v. Taylor,* 451 U.S. 527, 101 S.Ct. 1908 (1981) ..... 8, 26, 27

*Pembaur v. City of Cincinnati,* — U.S. —, 106 S.Ct. 1292 (1986) ..... 10, 12, 14

*Rhodes v. Chapman,* 452 U.S. 337, 101 S.Ct. 2392 (1981) ..... 23

*Rizzo v. Goode,* 423 U.S. 362, 96 S.Ct. 598 (1976) ..... 22

*Ruiz v. Estelle,* 679 F.2d 1115 (5th Cir. 1982) ..... 23

*Sostre v. McGinnis,* 442 F.2d 178 (2nd Cir. 1971), *cert. denied* 404 U.S. 1049 (1972) ..... 22

*Thibodeaux v. Bordelon,* 740 F.2d 329 (5th Cir. 1984) 27

*Union County Jail Inmates v. DiBuono,* 713 F.2d 984 (3rd Cir. 1983) ..... 20

*Via v. Cliff,* 470 F.2d 271 (3rd Cir. 1972) ..... 25

*Whitley v. Albers,* — U.S. —, 106 S.Ct. 1078 (1986) ..... 11, 19

*Wolff v. McDonnell,* 418 U.S. 539, 94 S.Ct. 2963 (1974) ..... 10, 13, 14

STATUTE

42 U.S.C. § 1983 ..... 8, 11, 12, 22, 26, 27

CONSTITUTION

Fifth Amendment to the U.S. Constitution ..... 1, 7, 18, 20, 21, 26

Eighth Amendment to the U.S. Constitution ..... 20, 22, 24

Fourteenth Amendment to the U.S. Constitution ..... 1, 7, 10, 18

## STATEMENT OF THE CASE

The original suit in this case[1] was filed by Petitioners on December 9, 1981, in the Northern District Court of Texas, alleging that conditions of confinement in Lubbock City Jail and other jails where Petitioners and other class members were incarcerated pending deportation amounted to deprivation of their due process rights under the Fifth and Fourteenth Amendments to the U.S. Constitution.

The case first came to trial on September 19-23, 1983. Among other conditions which were subsequently dropped on appeal, Petitioners complained of inadequate supervision and sanitation, lack of bedding, overcrowding, and inadequate fire safety and attorney access. The named plaintiffs, Ortega and Gonzalez, sought injunctive relief against INS and the City of Lubbock on behalf of themselves and their class and damages for themselves.

More than thirty (30) witnesses testified before the District Court issued a memorandum opinion July 23, 1985 (attached as Appendix B to Petitioner's Petition). The District Court found that Petitioners' claims were "without merit" and denied all relief sought by them; and, that the constitutional standard for conditions of confinement was not violated by defendants, pursuant to *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861 (1979).

Background facts may be found in the District Court's memorandum opinion which is App. B of the Petition. Such

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[1] This statement of the case is based on the findings of fact of the District Court and other undisputed facts in the record to which the District Court made no reference.

findings clearly dispute Petitioners' allegations and were upheld by the Fifth Circuit Court, on appeal.

Petitioners complain of the conditions of confinement in Lubbock City Jail [Petition 5-6] as grounds for a Writ of Certiorari to issue. Petitioners allege that "the jail was effectively abandoned". Petition 5. The District Court did not find that the Lubbock City Jail had been abandoned, but only that at the time Petitioners were held there the City no longer used it to hold their own prisoners. The Court further found that the City "continued to provide personnel to supervise the jail as well as food, maintenance, and bedding." App. B 14a. Based on the evidence presented, the District Court determined that the supervision provided, even though not organized or constant, protected the Petitioners and other detainees from any harm that might have occurred. App. B 18a.

Petitioners further allege that the District Court's finding that the City's desk sergeants provided some supervision to the detainees was clearly erroneous because the desk sergeants were not formally assigned to supervise them. Petition 5. However, as a practical matter, the desk sergeants did supervise them, e.g. they brought them meals and bedding and were also in the same building with them.[2]

Petitioners exaggerate the bedding conditions in Lubbock Jail at the time Petitioners were housed there.[3] The

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[2] The testimony was that the desk sergeants didn't have the *names* of the detainees, nor were they willing to allow attorneys to visit detainees without prior Border Patrol approval. But this didn't prove that there was a lack of supervision. It had nothing to do with supervision.

[3] They allege that "[T]he cotton mattresses which were occasionally provided were never cleaned; they were simply left in the cells unwashed until they disintegrated." Petition 5.

District Court found no evidence to support such a claim. The Petitioners paraded forth a number of witnesses who allegedly went without adequate bedding while incarcerated in Lubbock City Jail, awaiting deportation. App. B 15a-16a. But the District Court found that 72 bunks were available to the detainees. App. B 14a. It also found that the great weight of *credible* testimony was to the contrary of those witnesses. App. B 17a. Credible evidence indicated that the cells utilized by Border Patrol in Lubbock City Jail were equipped with bunks, commodes, drinking fountains, and showers. App. B 14a.

Petitioner Gonzalez was not placed in a cell with overcrowded conditions, but rather alone. App. B 12a. He was provided a mattress and blanket once it was discovered his cell lacked those. App. B 17a. Likewise, Ortega was not placed in overcrowded conditions. App. B 12a.

The detainees usually didn't inform anyone when they lacked bedding, so the District Court believed. Id. The City maintained a supply of mattresses and blankets for use by detainees as late as December, 1981, (the date of the filing of this lawsuit) and attempted to furnish detainees with such when needed. App. B 14a. Any defects in Lubbock Jail brought to the attention of the City were corrected. App. B 17a.

As to the allegation regarding overcrowding, the average stay of illegal aliens there was 1.4 days. As testified to, any potential overcrowding in Lubbock Jail was alleviated by use of other cells in the facility. There is no evidence that Petitioners were ever forced to sleep on the floor of Lubbock Jail.

There was also evidence that the detainees themselves tore up the mattresses, and that such mattresses did not vanish through the deterioration of being uncleaned. Id.

Petitioners further complain of the sanitary conditions of Lubbock City Jail. Petition 5. The District Court found that overall, "the evidence clearly indicates that Border Patrol agents and City personnel cared for detainee comfort and safety and took steps to make the aliens' short stay more comfortable." App. B 17a. Further testimony supported the Trial Court's finding that the sanitary conditions of the detainees were acceptable.[4]

Petitioners allege that in the Lubbock Jail, "[N]o one even turned on the heat in the winter." Petition 5. Petitioners recite no evidence for their unfounded accusation. To the contrary, the record clearly supports the Court's finding that Petitioners were adequately cared for while in Lubbock Jail. App. B 17a.

Exhibits introduced into evidence showed that the area where federal detainees were housed was an internal part of the police station. To argue that this holding area was inhumanly or harshly cold while the rest of the premises attached to it were comfortably warm was not supported by the evidence. There was no dispute that the cell area

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[4] The detainees were afforded functioning showers in Lubbock Jail [App. B 14a]; periodic, on-sight inspections were made [App. B 17a]; the only "unsanitary" conditions in federal detainees' cells were papers, cartons, and styrofoam containers strewn about the cell, or at times, torn up mattresses. The only "unsanitary" conditions in Petitioner Gonzalez's cell consisted of "trashy papers and old paper plates".

was equipped with heating and cooling in working condition.[5]

Gonzalez alleged his cell was cold, but in light of the facts and the testimony that he had all his clothes, a heavy jacket, and eventually a blanket, it seems his complaint of misery is exaggerated. Transcript 309-310, 319. Furthermore, he spent only one night in such alleged intolerable conditions. App. B 12a.

Petitioners allege that access to attorneys for them was difficult at best, as a result of the "policy" defendants had regarding visitation rights. Petition 6. However, the District Court held that the evidence indicated otherwise.[6]

Respondent City of Lubbock contends that the basic constitutional conditions at issue were factual in nature, and therefore, the District Court's findings of fact against

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[5] Of course, in the case of Ortega, the issue of heat was not important since he was housed there in the summer, September 1981. App. B 11a. Furthermore, he made no complaint about the heating.

[6] The District Court said, "aliens who wished to meet with lawyers were able to do so and that Border Patrol personnel did not interfere with this right. . . . [T]here is absolutely no evidence to suggest a denial or serious infringement by Border Patrol personnel of the detainees' right to contact and meet with attorneys." App. B 24a-25a. Contrary to the Petitioners' allegations that such visitation and access was denied, the record supported the Court's finding: federal detainees were extended the right to attorney access by the City through the instructions of Border Patrol. App. B 23a-25a; reasonable visitation was afforded for visitors of the illegal aliens housed in Lubbock Jail, including attorneys and the Consul for the Republic of Mexico. App. B 12a; Petitioner Ortega was afforded visitation and attorney access while incarcerated in Lubbock City Jail, [Id.], as was Appellant Gonzalez. App. B 13a.

Petitioners were not clearly erroneous because they were supported by the great weight of the evidence.

Even though Petitioners allege that the "Fifth Circuit affirmed on other grounds", implying that the Circuit Court was not ruling on the conditions of confinement, in fact, that was precisely what it was affirming: the District Court's finding that the conditions of confinement existing in the Lubbock City Jail did *not* amount to a constitutional deprivation against Petitioners. App. A 2a.[7]

The Fifth Circuit affirmed the District Court's judgment on all points, based upon the Circuit Court's reading of *Daniels v. Williams,* 474 U.S. —, 106 S.Ct. 662 (1986) and *Davidson v. Cannon,* 474 U.S. —, 106 S.Ct. 668 (1986).

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## SUMMARY OF ARGUMENT

Respondent City of Lubbock argues the following points in this Brief:

(1) The Fifth Circuit Court of Appeals correctly applied the holdings of *Daniels v. Williams* and *Davidson v. Cannon* to the circumstances of this case.

This case dealt with the conditions of confinement of INS detainees, not with negligent policies *per se.* The Fifth Circuit correctly applied the *Daniels* standard of

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[7] The main factual issue was whether "the conditions described violated their [Petitioners'] due process rights under the fifth amendment." App. A 3a. Only after the Circuit Court agreed with the correctness of the District Court's findings regarding the conditions, did the Circuit Court move on to the legal questions involved in the case.

due care to the *conduct* of government officials and was in no way creating a new or improper standard by which to measure the negligence of official conduct.

The Fifth Circuit's holding and standard of negligence applied in this case do not conflict with other court holdings, so there is no justification for Court review.

The evidence is lacking that government "policy" caused the constitutional deprivations alleged. Under the *Daniels* ruling, the conditions were held to be negligent only.

The allegation that the Fifth Circuit adopted a higher standard than *Davidson* is unfounded. The Circuit Court merely applied the negligence standard formulated in *Daniels* and adopted in *Davidson.*

(2) The Fifth Circuit did not "overrule" *Bell v. Wolfish.*

The Fifth Circuit was attempting to overlay the *Bell* standard of evaluating conditions of confinement with the *Daniels* decision. *Bell* did not directly apply to the conditions in this case, since such conditions did not amount to punishment. The Fifth Circuit retained the *Bell* standard for conditions of confinement that fell outside the *Daniels* scenario.

The cases cited by Petitioners that allegedly show the Fifth Circuit erred can be distinguished.

(3) The courts below did not err in holding that the conditions of confinement in Lubbock City jail did *not* amount to constitutional deprivation or punishment in violation of the Fifth or Fourteenth Amendments.

The District Court found no violation of the *Bell* standard. Each condition complained of failed to be proved up as a constitutional deprivation. Without first showing a constitutional deprivation, damages or other relief cannot be awarded under 42 U.S.C. § 1983.

(4) Petitioners have no standing in federal court to litigate a 42 U.S.C. § 1983 claim alleging due process deprivations against Respondent City of Lubbock because *Parratt v. Taylor,* 451 U.S. 527, 101 S.Ct. 1908 (1981) mandates that Petitioners must seek relief in state court where a post deprivation remedy satisfying due process requirements is made available by state law. Although this issue was never reached by the lower courts, Respondent City of Lubbock maintains that negligence claims cannot be brought under § 1983.

Respondent respectfully submits that the opinion rendered in this case by the Fifth Circuit Court was clearly correct in all material holdings and that Petitioners' application for writ of certiorari should be denied.

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## ARGUMENT UNDER QUESTION ONE

QUESTION 1: Whether the United States Court of Appeals for the Fifth Circuit correctly applied the holdings of *Daniels v. Williams* and *Davidson v. Cannon* to the circumstances of this case?

## I. Petitioners' argument regarding government policies does not apply.

Petitioners allege that one reason for issuing a writ of certiorari in this case is that the Fifth Circuit's opinion conflicts "in principle" with *Daniels*. Petition 9.[8] Petitioners claim that their injuries were "caused by negligent policies" not "[N]egligent acts of individual officials" [Petition 10], so *Daniels* does not even apply to this case.

Respondent City of Lubbock urges the Court to reject Petitioners' argument because it is untimely made. Petitioners never argued such a point on appeal, even though the application of the *Daniels* case was at issue at the appellate level. Therefore, they should not be allowed to argue now on final appeal the idea that their injuries were caused by certain government *policies* (as opposed to certain government *conduct,* as has been the issue since the trial on the merits), with the intent being to limit the application of *Daniels* to this case.

This ground for appeal should also be rejected because it is irrelevant to this case. The Fifth Circuit ruled on the *conduct* of Defendants in operating the Lubbock City Jail (i.e. conditions of confinement as maintained by City and federal officials), not on the *policies* of such Defendants. Therefore, the Fifth Circuit was correct in using the standard of negligence as espoused in *Daniels* to judge such conduct.

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[8] Petitioners claim that "[T]he Fifth Circuit's opinion in this case extends *Daniels* to hold that injuries caused by negligent government *policies* [*emphasis added*] do not state a due process violation either."

If negligent policies were ever at issue in this case, the District Court long ago ruled that the evidence was insufficient to find such. App. B 23a-26a, 30a-31a. Nor did the Fifth Circuit discover any evidence supporting the allegation that negligent government policies deprived Petitioners of their constitutional guarantees. App. A 2a, 4a.

The deprivation alleged in *Daniels* was the same type alleged in this case: a deprivation of their rights under the Due Process Clause of the Fourteenth Amendment. App. B 10a; App. A 3a; *Daniels,* at 663. Petitioners may allege the ground of negligent policies before this Court, but their allegations throughout this case have zeroed in on government officials' conduct towards them, e.g. Border Patrol agents, municipal officials, desk sergeants, etc.

Petitioners further discuss two lines of cases, once they have assumed the issue as being one of "policies" rather than official conduct. Petition 10-14. They claim that such cases conflict as to the standard of negligence that should be used in testing government policies for due process violations.[9]

Petitioners' analysis of policy v. conduct is both misleading and a waste of this Court's time. *Daniels* provided the Fifth Circuit a working definition of "negligence" with which to rule upon the issues of this case,

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[9] "This case provides an opportunity to resolve the apparent conflict between cases like *Wolff, Pembaur,* and *Owen,* in which the negligence or good faith of a policy is irrelevant to the finding of a due process violation, and cases like *Tuttle* and the others cited above in which a policy must manifest deliberate indifference in order to constitute a due process violation." Petition 14.

including testing government officials' acts in confining Petitioners. Id at 663.[10] As the record in this case clearly reflects, there was no credible evidence to support the allegation that Defendants engaged in deliberate policies so as to deprive Petitioners of Due Process.

Petitioners further assume that "[U]nconstitutional conditions" existed in Lubbock City Jail. Petition 17. This was a burden of proof *not* met by Petitioners. App. B 29a. This Court held in *Whitley v. Albers*, — U.S. —, 106 S.Ct. 1078, 1088 (1986), "that any ground properly raised below may be urged as a basis for affirmance of the Court of Appeals' decision," including District Court findings. The District Court found no constitutional deprivations due to the conditions of confinement as measured by the standard set forth in *Bell v. Wolfish*. The Fifth Circuit found no constitutional violations under *Daniels* or *Davidson*. App. A 6a-7a.

This Court ruled in *Daniels* that Petitioners must prove a violation of any underlying constitutional right before it may make a claim under 42 U.S.C. § 1983.[11] Petitioners failed to prove such. All other arguments, including negligent policy arguments, become moot since

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[10] The *Daniels* Court said that negligence amounted to "causing unintended loss of or injury to life, liberty or property." The very reason this Court heard *Daniels* was to decide when a tort (negligence) rises to a constitutional deprivation. at 664. The same question was reviewed by the Fifth Circuit.

[11] *Daniels*, at 664: " . . . in any given 1983 suit, the plaintiff must still prove a violation of the underlying constitutional right; and depending on the right, merely negligent conduct may not be enough to state a claim."

Petitioners failed to meet this threshold burden of proof. The Fifth Circuit merely upheld such a finding as negligence under *Daniels,* based upon the District Court's findings of fact.

Petitioners listed numerous cases in an attempt to support their claim that the Fifth Circuit had misapplied *Daniels* by "extending" it to negligent government policies rather than individual acts by government officials. They cited *Pembaur v. City of Cincinnati,* — U.S. —, 106 S.Ct. 1292 (1986) to argue a different standard of negligence exists for government policies than for individuals as established in *Daniels.* Petition 10-14. Petitioners then allege that the Fifth Circuit was using the wrong standard to measure the negligence in this case by assuming the question was one of negligent policies, not negligent conduct.

But even in *Pembaur,* the § 1983 action was based upon the *conduct* of government officials (i.e. an illegal search), not any policy *per se.* The facts of *Pembaur* support the obvious proposition that a policy is actionable only if there is conduct under that policy which causes a constitutional tort.[12]

Petitioners next allege that a government policy may in and of itself cause a deprivation even though the negligence of the officials carrying out the policy do not. Petition 11. In another context, this argument might be valid.

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[12] *Pembaur,* at 1297, quoting *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 691, 98 S.Ct. 2018, 2036 (1978): "Congress did not intend municipalities to be held liable unless *action* pursuant to official municipal policy of some nature *caused a constitutional tort.*" [*emphasis added*].

However, where there is no proof of such deprivation-causing policies, the argument is only a mere whimsy. This Court's practice has been to not hear arguments which are not presented by the facts of the case on appeal.

Petitioners cite *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963 (1974) for the proposition that government "officials were liable because of the policy they were pursuing." Petition 11. This is a misreading of how *Daniels* distinguished *Wolff*. The *Daniels* decision distinguished *Wolff* on the standard of negligence applied to the conduct of the prison officials involved, not on the issue of individual negligence versus policy negligence.[13]

Petitioners further claim that "[T]he Fifth Circuit's decision to excuse 'negligent policies' directly contradicts *Owen*," infra. Petition 12-13. If *Owen* is saying that the "interactive behavior of . . . government officials" [Petition 13] unintentionally causes constitutional infringements, then perhaps this part of *Owen* is pared back by *Daniels* and *Davidson*. However, contrary to Petitioners' reading, *Owen* was still addressing injurious *conduct*, not negligent policies. It merely stated that official policies governing or promoting such unconstitutional conduct may make the policy makers themselves liable for such depriving conduct on the part of their agents. Granted, a municipality's policy will not be exonerated under *Owen* or *Monell*, even if the policy is implemented in good faith, but this does

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[13] The plaintiff in *Daniels* had cited *Wolff* for the proposition that "it is almost certain that *some* negligence claims are within 1983." The Supreme Court responded that in *Wolff*, the prison officials' deliberate decision to deprive (i.e. a state of mind, not a question of policy) was more than mere negligence, as found in the facts of *Daniels*. at 666.

not make such cases inconsistent with either *Daniels* or this case.

In this case, no constitutional harm was found, only lack of due care on the part of some officials. Under the *Owen* holding, the policies in issue were likewise exonerated because there was no proof such policies either promoted the negligence of officials or caused its own deprivations. The cases that Petitioners cite found first that a municipality or other government entity was *liable* for policies that were fostering constitutionally depriving official acts. But these "policy" cases are relevant only if the policy is found to be depriving. There is no legal ground under our facts to justify resolving any apparent conflict between the cases cited by Petitioners.[14]

## II. Fifth Circuit's definition of negligence not contrary to Davidson.

Petitioners allege a second ground in their attempt to get a writ granted: that the Fifth Circuit's definition of "deliberate indifference" was contrary to the reasoning of *Davidson v. Cannon*. Petition 18. Petitioners see the Fifth Circuit defining negligence as "deliberate indiffer-

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[14] Petitioners urged that this case provides an opportunity to resolve the apparent conflict between cases life *Wolff, Pembaur,* and *Owen,* in which the negligence or good faith of a policy is irrelevant to the finding of a due process violation, and cases like *Tuttle* and the others cited above in which a policy must manifest deliberate indifference in order to constitute a due process violation. Petition 15-16. Under our facts, the standard of negligence as established by *Daniels* is clear when applied to questions of government officials' conduct. There is no need for such "apparent conflict" to be resolved.

ence'' then claim that this is fundamental error.[15] Apparently to Petitioners, the Fifth Circuit erred by citing to *Davidson* for a standard of negligence because (1) *Davidson* involved only a single isolated event, while this case had ''blind neglect'' for more than four years, and, (2) Davidson's negligence was not nearly as malicious as the ''deliberate indifference'' that was shown by defendants in this case.[16]

The findings of fact by the courts below do not support Petitioners' position. The conduct of officials in *Davidson* was much more reckless than the conduct in this case. App. A 8a, fn 5. The conditions complained of in this case also involved single isolated events, not ''blind neglect'' going on for over four years. Evidence abounds that defendants corrected conditions once they knew about them. Such conditions were held to be simple negligence under *Davidson* and *Daniels*.

The allegations regarding the Slaton, Texas jail, at Petition 19, were not part of the findings by the District

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[15] Petitioners mystically equated *negligence* with *deliberate indifference* by stating "[T]he question of negligence or deliberate indifference was not before the Court in that [*Davidson*] case. . . . Since Davidson conceded the issue of negligence, the Court did not need to decide whether the same actions might have been characterized as deliberate or reckless indifference," Petition 18. Apparently, Petitioners think that defendant's conduct amounted to deliberate indifference. By allowing such conduct to be considered "negligence", the Fifth Circuit has vis a vis adopted the standard of conduct at the level of deliberate indifference. So the argument goes.

[16] Petitioners alleged that "[s]uch repeated failure to take corrective action should give rise to a presumption of deliberate indifference. . . . The record is clear that INS and the City of Lubbock knew or should have known of the squalid conditions in the Lubbock Jail." Petition 19.

Court in this case nor were they ruled upon by the Fifth Circuit. App. B 9a, fn 1. They are obviously added for inflammatory effect and should be disregarded as irrelevant to this case.

Petitioners demand a definition of "deliberate indifference" even though it is not a standard of negligence that was relied upon, either in this case, or in the companion flagship cases of *Daniels* and *Davidson*. Petition 20. The *Davidson* decision relied on the *Daniels* standard of negligence, which was something less than a deliberate decision to deprive. Id at 670.

The apparent problem that Petitioners allege here is that the courts have not set forth a cookbook, black-and-white definition of the various standards of negligence which can be printed in a paragraph or less. The courts have the judicial discretion and duty to decide what standard of negligence fits what facts. The justices in *Davidson* dissented not because the majority had failed to define or clarify the standard of negligence they relied upon, but rather, because the dissent believed that the conduct of the officials amounted to more than a lack of due care, i.e. recklessness. Id at 673.

The evidence does not support a finding of deliberate indifference in this case. The Fifth Circuit merely applied a simple negligence standard to conduct that was much less reckless or willful than what was ruled upon by *Davidson*. The Fifth Circuit was well aware of Petitioner's contention and held otherwise. App. A 8a.

Comparing the facts of this case to the allegations of Petitioners and to the holdings in *Davidson*, it is clear that

the Fifth Circuit applied the correct standard of negligence in which to review defendants' conduct.

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## ARGUMENT UNDER QUESTION TWO

QUESTION 2: Whether *Daniels v. Williams* and *Davidson v. Cannon* overrule *Bell v. Wolfish?*

### I. The opinions below do not conflict with Bell v. Wolfish.

Petitioners argue a third reason for granting the writ of certiorari: the Fifth Circuit's decision in this case conflicts with *Bell*. Petition 20. They claim that the Fifth Circuit opinion "overrules . . . in part" the *Bell* standard regarding jail conditions and unconstitutional punishment. Id.[17]

The effect of the Fifth Circuit's ruling on *Bell* is minimal in this case. The Circuit Court was not attempting to "overrule" *Bell* (how could a circuit court overrule a Supreme Court decision?), but instead was attempting to harmonize and integrate the *Bell* case with the *Daniels* and *Davidson* decisions.

*Daniels* directly centers on conditions of confinement [at 663], as does *Davidson* [at 669]. This case likewise bottomed on conditions of confinement. To ignore *Dan-*

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[17] The Fifth Circuit's discussion of *Bell v. Wolfish* is found in context at App. A, 51-61. Nowhere in its opinion does the Circuit Court expressly attempt to overrule the *Bell* holding, in *toto* or in part. Its ruling must be read in context with the impact *Daniels* has on *Bell*.

*iels* and *Davidson* would be as unwise by the Circuit Court as it would be to pay blind homage to *Bell*.

This case still doesn't alter the fact that in cases where the conditions of confinement amount to punishment under the Fifth Amendment, the *Bell* standard should apply. However, pursuant *Daniels* and *Davidson*, where such conditions are caused by the mere negligence (lack of due care) of officials, then such negligence does not amount to a deprivation of due process. *Daniels* does not say that such conditions do not have to be abated if they amount to punishment under the Fifth Amendment, nor does the opinion in this case. In fact, such an application of *Daniels* never presented itself to the Fifth Circuit because the conditions of confinement in the Lubbock Jail were never shown to amount to punishment under the *Bell* standard.

Petitioners assume without proof that defendants' "policies were inadequate to protect detainees from senseless punishment" [Petition 21-22] and that the Fifth Circuit imposed no liability for such "punishment". As a matter of proof, Petitioners failed woefully to prove such punishing conditions of confinement in this case. A case built on rhetoric and unproved accusations is not a legitimate case for a writ of certiorari. *Daniels* and *Davidson* makes conduct based on mere negligence not elevate to Fourteenth Amendment protection. The Fifth Circuit was merely following that dictate.

By clear implication, the Fifth Circuit was not intending to "overrule" *Bell v. Wolfish* as the Petitioners

allege.[18] Petitioners make much ado about nothing because the Circuit Court didn't say "knew or should have known" instead of merely "knew". Petition 21-22, fn 17. The point is, the Fifth Circuit was distinguishing between standards of conduct and not looking for a way to excuse liability. By this language, the Circuit Court simply said that it would take more than mere negligence before conditions would come under the microscope of *Bell*.

But even if the Fifth Circuit deemphasized the holding of *Bell* in this case, the District Court adequately tested the circumstances against the *Bell* standard. App. B 28a-31a. In a thorough discussion, the District Court found that the conditions of confinement did *not* amount to punishment under *Bell*. Id.[19]

Petitioners again attempt to create a conflict between cases, hoping this Court will hear this case for that reason. Petition 23. However, the cases cited by Petitioners as being in apparent conflict with this case clearly do not govern.[20] The decision in this case does not necessarily conflict with *Bell*.

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[18] "Only if the evidence suggests that the appellees [defendants Lubbock and INS] knew of the jails' conditions, or intended to force the detainees to endure such conditions, would a *Bell* analysis retain vitality." App. A 6a.

[19] Accordingly, under *Whitley v. Albers*, at 1088, such a finding may be urged to affirm the Fifth Circuit's decision on this point. And even though the Circuit Court minimized the impact of *Bell* to these circumstances to some extent, it still incorporated the holding of the District Court regarding the *Bell* standard: "[T]he District Court found that the individual appellees lacked any intent to punish the detainees." App. A 6a.

[20] *Anela v. City of Wildwood*, 790 F.2d 1063 (3rd Cir. 1986), can be distinguished on the harshness of the conditions alone;

(Continued on following page)

## ARGUMENT UNDER QUESTION THREE

QUESTION 3: Whether the courts below erred in holding that the conditions of confinement in Lubbock City Jail did *not* amount to punishment in violation of the Fifth Amendment or to a deprivation of Petitioners' constitutional or legal right to due process?

### I. Case law and evidence supports the holding of the courts below.

Petitioners allege throughout this lawsuit that specific conditions of confinement amounted to constitutional deprivations and/or punishment, in spite of the evidence ruled upon by the courts below. Petition 6, 8, 23.

Respondent City contends that the courts below did not err in holding that the conditions of confinement in Lubbock City Jail did *not* amount to punishment in violation of the Fifth Amendment or to a deprivation of Peti-

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such conditions were found to be constitutionally depriving, unlike the conditions in this case. *Lareau v. Manson,* 651 F.2d 96 (2nd Cir. 1981), is a case dealing with long-term detainees' conditions that were alleged to be cruel and unusual punishment under the Eighth Amendment. The Eighth Amendment prohibition is inapplicable to pretrial detainees, *Bell* at 535, so such cases should also be inapplicable. *Union County Jail Inmates v. Di Buono,* 713 F.2d 984 (3rd Cir. 1983) was a case decided before *Daniels,* which also can be distinguished on the facts from this case. In *Union,* there was a finding by the district court that the conditions of confinement were constitutionally depriving under *Bell.*

tioners' constitutional or legal right to due process. Therefore, there is no issue in this matter upon which writ of review should issue.

The District Court in this case ruled, "in determining the constitutionality of [Petitioners'] confinement, the court must apply the due process clause of the Fifth Amendment. . . ." App. B 28a. The Court also said that a trial court should apply this constitutional standard "after considering the totality of the circumstances surrounding [Petitioners'] claims." Id. The District Court further noted that the Supreme Court "recognized in formulating this test that *de minimus* violations do not trigger liability. *Ingraham v. Wright,* 430 U.S. 651 (1977). . . ." App. B 29a.

The District Court then ruled, "[A]pplying the *Bell* standard to the claims of the [Petitioners], the court determines that no constitutional violation has occurred." App. B 29a.

Petitioners likened the problems in *Medina v. O'Neill,* 589 F.Supp. 1028 (S.D. Tex. 1984) to the conditions in this case. Petition 24. However, the District Court distinguished such case on the facts.[21]

Other case law supports the District Court's ruling. Compensatory damages can be awarded only if complain-

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[21] "[T]he voluminous record accumulated at trial wholly fails to reveal constitutional violations such as those identified in *Jones v. Diamond,* 636 F.2d 1364 (5th Cir. 1981), and *Medina v. O'Neill,* 589 F.Supp. 1040 (S.D. Tex. 1984)." App. B 31a.

ants can prove an infringement of federal constitutional rights. 42 U.S.C.-§ 1983; *Owen v. City of Independence,* 445 U.S. 622 (1980); *Baker v. McCollan,* 443 U.S. 137 (1979); *Martinez v. California,* 444 U.S. 277 (1980). Furthermore, only conditions of confinement that are severe or unconscionably intolerable or that violate basic concepts of decency constitute unconstitutional deprivations. *Novak v. Beto,* 453 F.2d 661 (5th Cir. 1971); *Adams v. Pate,* 445 F.2d 105 (7th Cir. 1971); *Hoitt v. Vitek,* 497 F.2d 598 (1st Cir. 1974); *Crowe v. Leeke,* 540 F.2d 740 (4th Cir. 1976); *Sostre v. McGinnis,* 442 F.2d 178 (2nd Cir. 1971), *cert. denied* 404 U.S. 1049 (1972).

As to Petitioners' claim of lack of supervision constituting a due process deprivation, generally, alleging inadequate supervision, direction, or control, or supervisory liability for inaction, will not support a claim for § 1983 purposes. *Rizzo v. Goode,* 423 U.S. 362 (1976).

An overview of complainants' authorities on this question of supervision indicates their reliance on cases that have no weight to the instant case. Cases like *Lareau* are cases turning on the issue of cruel and unusual punishment under the Eighth Amendment. The Eighth Amendment prohibition of cruel and unusual punishment is inapplicable to pre-trial detainees. *Bell,* at 535. *Lareau* also made a clear distinction in standards as regards the length of the confinement. Id at 104-105. The law does not require constant supervision unless to do otherwise would constitute cruel and unusual punishment in violation of the Eighth Amendment. *Jones v. Diamond,* 636 F.2d 1364 (5th Cir. 1981).

Petitioners complain that defendants deprived them by "senselessly overcrowding them to the point that detainees had to sleep on the concrete floor with only the trash for bedding." Petition 6. The facts prove there was no overcrowding while Petitioners were incarcerated in Lubbock City Jail. Furthermore, Petitioners' argument that overcrowding is unconstitutional is not even a valid argument.[22] For overcrowding to be unconstitutional *per se*, there must be such an effect on other conditions so as to reduce them below a constitutional minima. *Rhodes v. Chapman*, 452 U.S. 337 (1981); *Bell*. Petitioners failed to prove that the conditions at the Lubbock City Jail fell below a constitutional minima.

Numerous other cases with *worse* conditions than the allegations in the instant case were held *not* to be violative of constitutional standards for incarceration. *Griffin v. Smith*, 493 F.Supp. 129 (W.D.N.Y. 1980), included challenged prison conditions of "fungus-infested showers," failure of officials to timely respond to inmate calls, and "lack of access to the regular visiting rooms." The District Court in that case further said "that as uncomfortable or disagreeable as these claimed conditions may be to Plaintiffs, they simply fail to describe deprivations of constitutional proportions."

In *Novak v. Beto*, supra, the court's constitutional standard was whether such conditions were "base, inhuman and barbaric." In *Novak*, plaintiff had no mattress,

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22 "Neither the number of inmates in one cell nor the amount of space provided for an inmate in a dormitory alone determines whether confinement is cruel and unusual." *Ruiz v. Estelle*, 679 F.2d 1115, 1146 (5th Cir. 1982).

but it was not ruled to be depriving. Rather, a constitutional deprivation was when plaintiff was subjected to unscionably unsanitary conditions. Id at 665.

The conditions in *Adams v. Pate*, supra, are similar to the instant case, e.g. "dusty and dirt infested", yet they were not "so foul, so inhuman and so violative of basic concepts of decency" to be a deprivation of constitutional magnitude under the Eighth Amendment, or any other Amendment.

Petitioners further claimed that "lack of mattresses" in this case violated due process. Petition 23. The District Court ruled the great weight of evidence showed that Petitioners were given adequate bedding. Petitioner Ortega never even complained about his alleged lack of a mattress or any other conditions of his cell, even though he had ample opportunity to do so. App. B 11a, 12a. Petitioner Gonzalez was provided both a mattress and a blanket, and he slept on a bunk. App. B 12a-13a. Petitioners did not prove as a matter of fact or law that they were unconstitutionally deprived of bedding.

Further, there is no proof submitted that complainants ever slept on the floor while housed in Lubbock City Jail. Petitioner Ortega admitted that he slept on a bunk in a cell with fifteen bunks. Transcript 215, 219, 230, 900. Rather, the City cells utilized by defendant Border Patrol were always equipped with metal bunks. App. B 14a. The City also maintained a supply of mattresses and blankets for use by detainees as late as when this lawsuit was filed, and attempted to furnish detainees with such when needed. Transcript 120, 186, 413-415, 422, 622-625. The District Court likewise found that the City "continued to provide

personnel to supervise the jail as well as food, maintenance, and bedding." App. B 14a.

Petitioners complain of a lack of fire safety, but the District Ccurt found otherwise when weighing the testimony and other evidence. App. B 18a.

Petitioners likewise complain that INS policy "severely limited visitation rights" of Petitioners.[23] However, the District Court found a legitimate justification for such INS procedures. The court did not find any legitimacy to Petitioners' claim regarding attorney access, especially since they were both afforded legal counsel. App. B 12a, 13a, 23a-24a. Petitioners wholly failed to prove any unconstitutional deprivation based on delay in visitation and attorney access. *Via v. Cliff*, 470 F.2d 271, 274 (3rd Cir. 1972); *Adams v. Carlson*, 488 F.2d 619 (7th Cir. 1973); *Crusoe v. DeRobertis*, 714 F.2d 752 (7th Cir. 1983). *Crusoe* says that "the Due Process Clause provides that a prisoner must be allowed 'meaningful access' to the courts . . . in order to present . . . 'violations of constitutional rights.' " But it is only obstruction or prohibition of attorney access that arises to constitutional infringement, not a delay based upon the legitimate interests of the authorities. Id at 755-756.

There was no evidence that Petitioners were ever denied attorney access, only that it was "delayed" until Respondent City could get the approval from INS. The City had a compelling reason to seek such approval: Federal

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23 "[A]s a result many aliens were deported before their attorneys were able to speak with them or before they knew an attorney had been hired for them." Petition 6.

detainees kept in City's jail were *INS* prisoners, not City prisoners. App. B 31a-32a. Respondent City had no jurisdiction or authority other than to feed and house the federal detainees. Id.

The findings of fact recited by the courts below, coupled with the cases argued above, clearly show that the courts below did not err in holding that the conditions complained of did *not* violate Petitioners' rights nor amount to punishment under the Fifth Amendment.

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## ARGUMENT UNDER QUESTION FOUR

QUESTION 4: Whether Petitioners have standing in federal court to litigate a 42 U.S.C. § 1983 claim alleging due process deprivations under the Fourteenth Amendment against Respondent City of Lubbock, considering the restrictions of *Parratt v. Taylor,* 451 U.S. 527, 101 S.Ct. 1908 (1981), and notwithstanding the modification of *Parratt* by the holding in *Daniels v. Williams?*

### I. Petitioners have no standing to sue under 42 U.S.C. § 1983.

The decision in *Daniels* overruled *Parratt* "to the extent that it states mere lack of due care by a state official may 'deprive' an individual of life, liberty or property under the Fourteenth Amendment." Id at 665. However, the rest of the impact in *Parratt* apparently remains intact. It is the remaining rule of *Parratt* that Respondent City contends initially barred Petitioners from suing Respondent City of Lubbock under 42 U.S.C. § 1983 upon the facts found in this case.

Although Respondent timely filed its motion to dismiss pursuant to *Parratt,* the District Court never decided on its merit but instead found for the defendants on other grounds. App. B. The Fifth Circuit affirmed, also on other grounds besides *Parratt.* App. A.

Respondent City still contends that it is not liable as a matter of law under the doctrine of post-deprivation remedy as set forth in *Parratt.* Respondent alleges that Petitioners are afforded an adequate post-deprivation remedy available in state court that satisfies the requirements of due process. Therefore, they are barred from bringing a claim in federal district court under 42 U.S.C. § 1983 against Respondent City of Lubbock. *Parratt v. Taylor; Thibodeaux v. Bordelon,* 740 F.2d 329 (5th Cir. 1984).

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## CONCLUSION

Respondent City of Lubbock respectfully submits that the opinion rendered in this case by the U.S. Court of Appeals for the Fifth Circuit was clearly correct in all material holdings; that the decision in this case is not in conflict with the decision of another federal court of appeals or with applicable decisions of the U.S. Supreme Court on the same matter, so as to call for a review by this Court; that the decision in this case is not one which decided an important question of federal law which has not been, but should be, settled by this Court; and that, therefore, a review on writ of certiorari should not issue in this case because there are no special or important reasons to grant such writ.

WHEREFORE, Respondent City of Lubbock, Texas, and its Mayor, pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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